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Art. 58 DARIO, activities of international organizations and complicity of States in the global international law

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Abstract: The subject of this paper is the complicity of the State in the offense committed by an international organization in the exercise of its regulatory function. The framework in which the case in question unfolds logically presupposes that the complicit State is part of the agreement of the body which is the author of the main conduct. We would try to examination of a question that takes on a preliminary character with respect to the one we intend to address in the following pages. This is the possibility that the main crime is supplemented by a regulatory act. We are also interested to examine the conditions under which the concurrence in the resolution of a third degree legislative act must be qualified in terms of complicity pursuant to art. 58 DARIO

Keywords: DARIO, ARSIWA, ILC, ICJ, international law, international responsibility, international organization, UN law, complicity of States, ECtHR, CJEU, ICTY.

Introduction[1]

The survey of this paper is the complicity of the State in the offense committed by an international organization in the exercise of its regulatory function. The framework in which the case in question unfolds logically presupposes that the complicit State is part of the agreement of the body which is the author of the main conduct.

In the first place we will carry out the examination of a question that takes on a preliminary character with respect to the one we intend to address in the following pages. This is the possibility that the main crime is supplemented by a regulatory act.

Secondly, we will examine the conditions under which the concurrence in the resolution of a third degree legislative act must be qualified in terms of complicity pursuant to art. 58 DARIO[2].

We will examine the way in which art. 58 DARIO in the hypothesis of conduct held by the States within the UN Security Council. For the purposes of our analysis, the decision adopted

1I would like to thank the anonymous reviewers and especially prof. Liakopoulos for his helpful comments on an earlier draft of my paper.

2ILC, Draft articles on the responsibility of international organizations with commentaries thereto, adopted on second reading at its 63rd session, August 2011, UN Doc. A/66/10, in Yearbook of International Law Commission, 2011, vol. II, par. II. Nel 2009, the ILC gas approved the project during the first reading. See Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009), UN Doc. A/64/10.

by this body based on art. 41 of the Statute of the organization can be taken as a useful model for the reconstruction of some general criteria. First of all, these are normative acts that can fly the international obligations that are incumbent on the organization. Furthermore, in the panorama of international organizations, as we have seen in the previous paragraphs, is very common to find a body with a limited composition to which the Member States have delegated the exercise of certain functions. There is also another aspect of a structural nature which suggests taking the advice, for example, of a body in which the case of complicity can be integrated as for art. 58 (Liakopoulos, 2020). Some members benefit from a differentiated legal position which in our opinion can constitute a valid prerequisite for assigning these states of responsibility as a competition with the international organization.

Configurability of the unlawful act by regulatory norm

The qualification of a datum made as an illicit depends on the norm establishing the international obligation, so that depending on the content of obligation. The violation of this will be constituted by the conduct of a legislative or an administrative or a judicial body. In our opinion it is necessary to move from this premise to the assessment of responsibility of international organizations for regulatory acts. From International Law

Commission's (ILC) codification works, it can easily be deduced that under certain conditions the responsibility of an international organization may arise as a result of a regulatory act having binding effect in contrast with an obligation of the entity itself (Wengler, 1952; Virally 1974; Butkiewitcz, 1981-1982; Perez Gonzalez, 1988, Dominicè, 2005; Reinisch, 2007; Klein, 2010, Petiteville, 2021). The following considerations apply.

In the first place, the principle for which the conduct of any administrative or judicial legislative body is suitable for engaging the international state responsibility is now widely accepted (Ago, 1963; Von Münch, 1963). In his third report on the subject rapporteur Ago, had proposed a provision specifically defining this principle (Ago, 1971)[3], which was then merged without particular modifications, in art. 6 of the project of articles on state responsibility approved in (first reading) 1996. The aforementioned rule established that: "The conduct of an organ of the State shall be considered to the constituent, legislative judicial or other power (...)"[4]. It should be emphasized that International Court of Justice (ICJ) in the

3"article 6: Irrelevance of the position of an organ of the State in the distribution of powers and internal hierarchy. For the purposes of determining whether the conduct of an organ of the State is an act of the State in international law, the questions whether that organ belongs to the constituent legislative, judicial or other power, whether its functions are of an international law an internal character and whether it holds a superior or a subordinate position in the hierarchy of the State, are irrelevant (...)".

4Yearbook of International Law Commission, vol. II, p. 193.

advisory opinion of the Commission on human rights found that the rule under examination was of a customary nature (Zimmermann, Tams, Oellers-Fraham, 2019)[5]. This is a provision that is also located in the draft articles approved in second reading in 2001. According to art. 4, par. 1:

"(…) the conditional of any state organ is considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions (...)"[6].

What is highlighted in the briefly illustrated provisions is the question of imputability of the conduct carried out by legislative state bodies. This is a principle acquired so much that in the codification process it did not have to be listed among the motivated norms in terms of the progressive development of international law. The principle of unity of the State with respect to international order constitutes the shared basis on which even the most recent doctrine has argued in the sense indicated lastly (Borchard, 1914; Eagleton, 1928, Verdross, 1929; Dahm, 1961; Ago, 1971)[7], in the assumption that the internal normative acts

5ICJ, Difference relating to immunity from legal process of a special rapporteur of the commission on human rights, advisory opinion 29 April 1999, par. 65). op. cit., p. 29, par. 62. Orientations which is affirmed also in the case: Application of the convention on the prevention and punishment of the crime of genocide, preliminary objections, judgment of 11 July 1996, ICJ Reports 1996, p. 202, par. 385.

6ARSIWA, par. 40 (International Law Commission (ILC), Draft articles on responsibility of States for intentionally wrongful acts, with commentaries, 2001, UN Doc. A/56/10, in Yearbook of International Law Commission, 2001, vol. II, part two, p. 31ss)

7In particular the reference to the codification Conference of 1930 that established in art. 6 of the resolution that state responsibility may well arise as a result of commissions or omissions of the legislative power. In this sense, the internal practice that the material limits of the present work do not describe in detail is also evident. There are some cases that deserve to be quickly mentioned. See for example from the ECtHR. Dudgeon v. United Kingdom of 22 October 1981, par. 41, in which the

are mere facts before international law, made that are relevant if the order contained in them is such as to require the State to behave contrary to its international obligations (De Visscher, 1924). It is also hardly necessary to point out that the thesis (Hoijer, 1930) which excluded this form of responsibility due to the sovereign character of the legislative activity, since this characteristic is common to most of the state activities, no longer seems sustainable.

Once is established that under the subjective profile the legislative act is attributable to the State, it must then be verified whether the conduct objectively establishes the violation of an international obligation. It is the provision that establishes the obligation to establish whether the legislative act constitutes a violation, so that for example the obligation for a State to issue certain rules in its internal system is violated by the omission of the tax activity[8]. If this last consideration is well founded, it

ECtHR considered that the mere validity of legislation incompatible with the ECHR in itself incorporated the responsibility of the respondent State regardless of its unlawful application.

8The internal law may constitute in certain circumstances an international illicit. In this perspective, in addition to the damage, there is also the element of guilt, considering that the legislative act integrates an offense only if you are negligent or if the national legislator has not taken into due consideration those elements of fact which should have been taken into account. That the analysis of liability by legislative act must take into account the nature of the violated obligation also results from the distinction between norms that impose a specific conduct and rules that oblige the achievement of a certain result distinction that the doctor had already correctly set in his general terms. What comes to the fore is that the content of the law is inherently illegitimate since in the case in which on the basis of an internally unimpeachable law were issued acts contrary to illicit international obligations would be the acts of emanation and not the law itself.

must be assumed that the examination relating to any illegal act deriving from a legislative one must be carried out on a case by case basis due to the nature of the violated obligation, as is not necessary for the actual execution of the act in question[9].

In the second place, assuming third-degree sources in the same way as normative acts does not mean ignoring the differences between international and legislative acts of domestic law. What is relevant in our perspective is the common regulation of the acts in question. The very notion of normative act implies the concurrence of a double structural element. It must be a juridical act with the exclusion of mere legal facts. Secondly, the content of the act must be classifiable as normative, consisting of one or more provisions suitable to act as rules of conduct in the life of a relationship. The first of the two structural elements mentioned above is widely known that in the international order between the various subjective juridical acts, there are some that rise to the category of juridical acts because of the role that the subject of the will assumes in them. In this regard it is hardly necessary to point out that for our purposes the requirement of subjective imputation is satisfied by the circumstance assumed by way of a

9The mere emanation of a state regulation in itself contrary to the international obligations of the State is not sufficient to integrate an illegal place that the state exercises its power at the time of coercion or when coercion is likely or imminent rather than through the mere emanation of a law that does not have or does not have a gap or possibility of being applied in practice. If it is true that the international offense is perfected in most cases only with the execution of the law it is necessary that the injured state is used to raise protests or complaints from the moment of the approval of a law which, if executed it would produce unjust harm to them.

logical premise that the organizations in question are subject to international law. As for the second of the two elements, it has already been observed that some functional bodies are authorized to carry out regulatory activities which give rise to third-degree sources.

These are expressions of will of the subjects of the legal system in which the competence to dictate rules of behaviour by means of deeds, which produce legal norms that have the force conferred on them by law, is recognized. That then the law is the prototype of the normative act is completely irrelevant if we consider it necessary. In the general theory of law the extension of the notion of normative act to those of the international order is authoritatively accepted, whose sources pose autonomous rules and commands rather than heteronomous inter or even *super partes.* Hard core in our opinion is the effect produced by the normative act, whether internal or international. Each in the context of his own legal system and in compliance with his own forms of regulatory production is able to innovate the legal situations of the respective subjects, resulting in a change in existing legal conditions. Within the international order the third degree sources are able to innovate Member States' juridical position on the basis of the will expressed by them by means of the establishing agreement.

In light of these considerations, we must understand the analogy

with the normative acts of domestic law, not wanting to assert that international organizations are endowed with legislative powers. These are capable of affecting the juridical situation of individuals who in our perspective are subjects of a different ordering and distinct from the international one.

(Follows) Responsibility of an international organization resulting from a third degree source

A further evaluation is indispensable, which we believe strongly argues in favor of the considerations briefly traced concerning the responsibility of functional bodies for deliberative activities. In terms of imputation, art. 4 DARIO undoubtedly allows to configure the normative acts in the same way as conduct, in principle referable to a functional entity. This rule must then be coordinated with art. 17, par. 1 that in our opinion consistent with the entire international liability regime establishes that an international organization:

"Incurs international responsibility if it circumvents one of its international obligations by adopting a binding decision to Member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization" (Liakopoulos, 2020).

The par. 3 of the same provision clarifies that the aforementioned law is applicable "whether or not the act in question is internationally wrongful for Member States or international organizations to which the decision (…) is

addressed"[10]. As is evident from the literal side of art. 17 distinguishes *expressis verbis* the hypothesis of a binding act (decision) from that of an act with authorization and non-binding content regulated instead by par. 2 of the same article. The assumption of the rule in question is well summarized in the words of the Austrian delegate to the VI Committee of the UN General Assembly for which international organizations cannot evade the rules on responsibility "by outsourcing its actors"[11]. In the shared assumption of ILC[12] and Gaja[13] the execution of decisions by Member States does not raise the organization from the responsibility for the illicit that derives from it. But what we want to highlight for the purposes of our analysis is that this responsibility arises independently from the actual execution of the act by the States they are addressed to. The general tenor of art. 17, par. 1 indeed "does not stipulate as a precondition, for the international responsibility of an international organization to arise that the required act be committed by Member States"[14]. Therefore, since the execution of the decision by these States "is to be expected the likelihood of a third party being injured would then be high"[15]. According to ILC regulations, the

10DARIO, pp. 40-43.
11UN Doc. A/C.6/59/SR.22, par. 24.
12DARIO, p. 40, par. 5.
13G. Gaja, Third report on responsibility of international organizations, UN Doc. A/CN.4/553, 2003, pp. 16, par. 36.
14DARIO, par. 41.
15DARIO, par. 41.

organization's responsibility is determined in similar circumstances due to the mere fact of having adopted the decision, a circumstance that legitimizes "the third party that would be injured to seek a remedy even before the act is committed (...)" (Nedelski, Nollakemper, 2012).

The criterion with which to evaluate the actual occurrence of the case described in par. 1 of art. 17 consists of the margin of discretion available to States in the fulfilment of what is imposed by the decision of an international organization. The parameter in question also emerges as a criterion for assessing Member States responsibility which, in order to carry out a third degree source, put violations on the obligations incumbent on them thanks to general international or contractual law. Here it must be emphasized that if the deed contains a command determined in all its elements and therefore does not leave to its addressees no margin of discretion either with regard to whether, when or how its execution[16] and contextually is contrary to an international obligation of the institution that approved it[17]. Gaja specifies that in the hypothesis of the institution in question the states have a certain degree of discretion, since the responsibility of the organization that has deliberated the act cannot be invoked (Tzanakopoulos, 2011; Voulgaris, 2014)[18].

16ARIO, p. 41.

17G. Gaja, Third report on responsibility of international organizations, op. cit., p. 12, par. 30.

18It must be emphasized that this criterion differs from the traditional canon of

Consequently, a decision that requires States to behave in a specific way in order to fulfil the obligations contained in it entails an international unlawful act of the organization that adopted it regardless of its actual execution. In such circumstances the organization exercises a regulatory control (Tzanakopoulos, 2011), on its Member States, which would give rise to a form of indirect responsibility in the case of the same entity (Voulgaris, 2014). That the absence of discretion for the members implies the imputation of conduct to the deliberating organization is a datum now widely acquired by the doctrine (Ritter, 1961; Gaja, 1988; Hirsch, 1995; Klein, 1998; Frank, 1999; Tzanakopoulos, 2011; Voulgaris, 2014) and consolidated in practice.

In this last profile, it should be noted that in the well-known Court of Justice of the European Union (CJEU), C-175/84, Krohn v. The European Commission case of 26 February 1986[19],

factual control, precisely from art. 17 ARSIWA that the same project of 2011 assumes as criterion of attribution of responsibility in art. 15 (and specularly in art. 59). In this case, centered on regulatory control, it is not required that the fact be unlawful even for the controlled party. It is integrated regardless of the existence of the subjective element of the organization that exercises the control in question.

19CJEU, C-175/84, Krohn v. European Commission of 26 February 1986, ECLI:EU:C:1986:85, I-00753. It was an action of non-contractual liability brought by a German company Krohn & Co. Import/Export for the prejudice suffered following the refusal by the Bundesanstalt für Landwirtschaftliche Marktordnung (BALM) of Frankfurt to implement a Commission regulation, to issue to that company certain import licenses. The problem of imputation was underlined in the same way as a preliminary question, given that the jurisdiction of the Community judge with regard to actions involving non-contractual liability exists only if the damage was caused by an institution of the Union. If, on the other hand, the damage was caused by the state authorities, even if due to the application of a Community act, the jurisdiction falls to the national Court. In the same spirit see also the case: C-101/78, Granaria v. H. v. A.,

CJEU in that time after having ascertained that the nature of the Community act executed by the German authorities was such as not to leave them any margin of maneuver. It concluded that the unlawful act enclosed by the applicant in support of its right the compensation is attributable not to the BALM, which was required to comply with the Commission's instructions, but precisely to the latter. That is because of the criterion indicated the same CJEU had reached a conclusion of opposite sign C-133/79, Ducrimez and Westzucker v. Commission case of 27 March 1980[20], where the Luxembourg judge rejected the claims for damages since the alleged injury had been put in place by the national authorities in execution of the non-binding act of the Commission. An orientation of a third degree source can also be found in the well-known C-184/95, Dorsch Consult v. Council case of 28 April 1998 (Lenaerts, Maselis, Gutman, 2014; Derlèn, Lindholm, 2018; Bouveresse, Ritleng, 2018; Clêment-Wilz, 2019; Del Pozo, Francisco, 2020; Lenaerts, Gutierrrez Fons, 2020)[21]. The general Court given the appeal to annul the Regulation n. 2340/1990 adopted for the purpose of implementing the Resolution no. 661/1990 of the UN Security Council held that the damage complained of by the appellant

of 13 February 1979, ECLI:EU:C:1979:38, I-00623, par. 13-14.

20CJEU, C-133/79, Ducrimez and Westzucker v. Commission of 27 March 1980, ECLI:EU:C:1980:104, I-01299, parrr. 13-25. C-217/81, Interagra SA v. Commission of 10 June 1982,ECLI:EU:C:1982:222, I-02233, parr. 7-11.

21CJEU, C-184/95, Dorsch Consult v. Council of 28 April 1998, ECLI:EU:C:1998:74, I-00667.

should be considered attributable to this Resolution, whose content imposed precisely the conduct object of the complaint. Similar reasoning can be found in the well-known Kadi and Yusuf sentence of 21 September 2005 in which the EU Council implemented the Resolution no. 1267/1999 of the UN Security Council. The judgments under consideration together with the second degree sentence of the CJEU (Kadi and Yusuf judgment) have raised some substantive legal issues extensively explored by the doctrine (Cannizzaro, 2006; Rideau, Balmond, Arcari, 2010) that cannot be explored in this context. It should only be emphasized that the general Court has enhanced the circumstance for which, by adopting the contested regulation, the Community institutions had acted on the basis of a bounded competence having no margin of discretion as regards the execution of the measures imposed by the aforementioned resolution. On the contrary, where the same Court has recognized the existence of discretion, was finally reached a different solution. In T-282/02, Organization des modjahedines du peule d'Iran v. Council sentence of 12 December 2006 has partially accepted the applicants' arguments, believing in part that the present case was different from the previous Yusuf and kadi decision for a decisive reason. In these proceedings a community act was contested which constituted the exercise of binding powers on the part of EU Council, which had confined

itself to transposing the measures imposed by Security Council into Community law. On the contrary, in the Organization des Modjahedines case the conduct of EU Council constituting the exercise of its own power, even if finalized to the fulfilment of an obligation of result imposed by a Resolution of the Security Council exposed itself to the Union judge in the same way as do EU law (Leinarte, 2021).

Even some pronunciations by European Court of Human Rights (ECtHR) seem relevant to the profile examined here. It appears to be significant the Nada v. Switzerland case of 12 September 2012. The normative act although at the origin of the grievance was the same that had given rise to the Kadi case, i.e. Resolution n. 1267/1999. ECtHR has accepted the appeal based on the topic for which the state "enjoyed some latitude which was admittedly limited but nevertheless real, in implementing the relevant Resolution of the UN Security Council" (Voulgaris, 2014). Regardless of the criticism that can be addressed to this reasoning, the centrality seems to be the Al Dulimi v. Switzerland case of 26 June 2016. ECtHR attributes decisive importance to the topic for which Resolution no. 1483/2003 of Security Council (Kirgis, 2003)[22] at the origin of the state conduct object of the grievance "do not confer on the States concerned any discretion in the implementation of the

22S/RES71483 (2003), 22 May 2003, par. 23.

obligations arising there under (…)" (Kirgis, 2003).

The responsibility of an international organization for legislation from art. 17, par. of the 2011 project follows the approach for which the normative act abstractly contrary to international law is not sufficient to integrate the responsibility of the subject that adopted it in the absence of its concrete application. This rule governs the responsibility of an organization that authorizes Member States to perform an act "that would be internationally wrongful if committed by that organization" (Liakopoulos., 2020) but subordinates the arising of this responsibility to the effective and concrete execution of what is authorized.

Participation in the deliberative procedure as an hypothesis of complicity. The need to "isolate" state behaviour from the outcome of the procedure

Given the conditions under which a legislative act is suitable to integrate the responsibility of an international organization, is necessary to dwell on the possible involvement of Member States with respect to the categories of conduct examined. It is a matter of assessing the circumstances under which the behaviour of Member States is able to carry out the case of complicity in relation to the main crime constituted by the regulatory act of the functional entity itself. To this end, it must be emphasized that the conduct of individual members is susceptible to a

separate assessment with respect to that relating to the regulatory act that they contribute to determine.

As noted by PCIJ in the advisory opinion of 1925 on art. 3, par. 2 of the Treaty of Lausanne (Söfker, 2014)[23] the delegates within the organ of an international organization commit the responsibility of the respective States. The conduct held by a delegate within an organ is always attributable to the State on whose behalf it acts without prejudice to the fact that the decision is attributed to the organization. Useful indications can be obtained from the judgment of 5 December 2011 by which the ICJ ascertained the responsibility of Greece for having opposed NATO within the admission of the former Federal Republic of Macedonia (Zimmermann, Tams, Oellers-Fraham, 2019)[24]. In this case, the responsibility of the defendant state was based on the violation of an obligation imposed on it in the same way as the provisional agreement concluded between the parties on 13 September 1995. ICJ's ruling is inscribed in the complex framework of the dispute between former Yugoslav Republic of Macedonia (FYROM), on the one hand and Greece on the other concerning the use of the name Macedonia as part of the first

23CPIJ, Consultative opinion of 21 November 1925 relative to art. 3, par. 2 of the treaty of Lausanne (Frontier between Turkey and Iraq) in collection of advisory opinions, series B-N 12, p. 29, where the UN Council "is composed of representatives of members that is to say of persons delegated by their respective governments, from whom they receive instructions and whose responsibility they engage (...)".

24ICJ, Application of the interim accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), 2008-2011.

state. During the NATO summit in Bucharest (2008), a decision was made not to invite the state actor to start preliminary negotiations on the admission to the organization, until "a mutually acceptable solution to the same issue" is reached[25]. How the ICJ has easily ascertained the conclusion reached in the course of the summit constituted a direct consequence of the Greek facilitated pressures due to the particular nature of the admission procedure foreseen by the Treaty of Washington of 1949. The appeal of FYROM focused on the alleged violation by Greece of the obligation contained in art. 11, par. 1 of provisional agreement not to oppose the admission of the former in international organizations of which the second phase was a member. ICJ accepted the appeal stating that Greece by obeying the admission of the former Republic of Macedonia to NATO has breached its obligation under article 11, par. 1 of the interim accord of 13 September 1995.

The case just mentioned is outside the scope of our investigation since the responsibility of Greece will not be integrated by participation in the offense of others but exclusively by the violation of the obligation pending on it to hold a certain behaviour within the decision-making body. It seems useful to us to dwell on the orientation adopted by ICJ with regard to certain issues that are relevant to our investigation. Firstly, it

25Bucharest Summit Declaration issued Heads of State and of governments participating in the Meeting of the North Atlantic Council on 3 April 2008.

attributes to Greece the conduct it has held that such conduct can be assessed independently of NATO's decision. ICJ therefore rejected the Greek defense argument. It was not able to separate the position of the Greek delegate from the collective resolution adopted by the Atlantic Council. It raised that the object of Macedonian appeal concerned the alleged violation of an obligation incumbent exclusively on the agreed State and not on NATO (Zimmermann, Tams, Oellers-Fraham, 2019)[26]. Secondly, and this is probably the decisive aspect for ICJ, the primary rule relevant in the present case established a specific duty of conduct suitable for imposing itself on Greece and binding its activity even when the latter found itself acting within the decision-making body of an international organization.

(Follows) The conditions set by art. 58 DARIO to the complicity of states in the offense deriving from the legislative act

According to a first orientation, simple participation in the vote, although not decisive for the purpose of adopting the regulatory act, can commit the responsibility of Member State to complicity (Klein, 1998; Quian, 2006; Klein, 2010; Sarroshi,

26The ICJ assessed the Greek conduct legally independent of the content of the Resolution of the Atlantic Council with the precise indication that the rights and obligations of NATO and other Member States do not come to the fore in resolving the dispute in question, so the argument based on the principle of gold money is to be considered misplaced.

2013; Katz Cogan, Hurd, Johnstone, 2016)[27]. In the opinion of another part of the doctrine, this offense is produced only under the "very special circumstances" (D'Aspremont, 2007), which occur if and to the extent that the state conduct has made it possible to the Commission of the unlawful act by the organization (Seidl-Hohenveeldern, 1987; Geslin, 2005)[28]. Otherwise it is observed, it would deny any allegiance to the distinct legal personality of the organization that adopted the act. The solution accepted by art. 58 DARIO is attributable to this orientation as can be seen from the letter of the provision and from the comment that the ILC itself provided. In ILC's opinion

"(…) the possibility that aid or assistance could result from conduct taken by the State within the framework of the organization cannot be totally excluded

27Member States incur complicity when they facilitate the adoption of a normative act "that mandates the Commission of the internationally worn act". According to the author (Sarroshi) the participation in the decision-making process by a Member State exposes the latter to the attribution of responsibility due to the deliberative organization. This position is based on the assumption that the Member States exercise a form of control over the normative conduct of the institution. The jurisprudence expressed by the People's Republic of China within the VI Committee at the General Assembly during the discussions on DARIOs seems to be related to this orientation "since the decisions and actions of an international organization were, as a rule, under the control or reliant of the support of Member States, i.e. those Member States that voted in favour of the decision in question or implemented the relevant decision, recommendation or authorization should incur a corresponding international responsibility", Sixth Committee, summary record of the 11th meeting, in GAOR 23 November 2005, Doc. A/C.60/SR.11, p. 10, par. 543.

28Seidl-Hohenveldern considers the responsibility of a Member State for the Organization's decisions "should depend on the fact whether or not the Member State, by participating in the decision of the Organization, would be able to prevent the adoption of the decision concerned". In this perspective the provision contained in art. 12, par. 2 of the Charter of economic rights and duties of the States which imposes on the organization and the respective Member States "a duty to ensure that the policies of the organization concerned correspond to the provisions of this Charter (...)".

(...)"[29].

In even clearer terms Gaja emphasized in his fourth report that the relevant conduct for the purposes of state complicity "could not simply consist in participating in the decision making process in the implicit assumption that participation in the vote may well be configured as an aid or assistance pursuant to art. 58"[30].

The configurability of the case in question is subject to the condition post from par. 2 in art. 28 based on which: "An act by a Member State of an international organization done in accordance with the rules of the Organization does not as such engage the international responsibility of that State under the terms of this article". It can be deduced that the physiological participation in the regulatory activity of the institution is in itself not suitable to impose the responsibility provided for by the same provision in par. 1.

It seems possible to conclude that Member States' conduct within the framework of a third-degree regulatory procedure must qualify as an unlawful act of complicity only if is a necessary condition for the occurrence of the main crime (Klein, 2012). The causal link between accessory and main fact in the specific hypothesis assumes the form of conditionality having to verify from time to time if the damaging act could have been

29DARIO, p. 91, par. 4.

30G. Gaja, Fourth report on responsibility of international organization, add. 1, UN Doc. A/CN.4/564/Add.1, p. 5, par. 62.

adopted without the favourable vote of the State in consideration. In the event of a positive response, it should be excluded the application of art. 58. The solution adopted by ILC and supported by the majority doctrine, takes into consideration both the nature of international organizations and the need to guarantee their normal and ordinary functioning. On the one hand, in the exercise of legislative activity, organizations' will is to varying degrees influenced by the will of individual Member States. For this reason the decision-making process that is established in organs with a state composition cannot reasonably be considered as originating, in the same way as the legislative procedure of a State. On the other hand, it is in the decision-making process that the existence of a will distinct from that of Member States is tested. In the situation contemplated by art. 58 the will and consequent normative activity of the organization is determined with the contribution of that of Member State without for this reason the second overlaps or replaces the first one.

It has been argued that through par. 2 of art. 58 DARIO, ILC would have set a cause of exclusion of the illegality different from those codified both in ARSIWA and DARIO constituted by the fulfilment of the internal rules to the organization to which the illegal regulatory act is attributed (Lanovoy, 2016). It seems that art. 50 requires an assessment of the complicity in the

regulatory act by reason of the contribution that each State lends within the deliberating body, without excluding that the accessory fact comes into being even in situations that comply with the internal law of the functional body. In other words, even the institutional framework in which the main crime is produced can play a decisive role in assessing the circumstances of the case. It is undeniable that the nature of the body to which this offense is attributable together with the possibly differentiated position of some Member States with respect to others are elements that contribute to determining the contribution of each State with respect to the damaging act (Seidl-Hohenveldern, 1987)[31]. The project itself expressly admits that "the size of membership and nature of involvement will probably be decisive"[32]. These observations make it possible to apply the provisions of art. 58 to the conduct held by some members of the Security Council with respect to the decisions taken by this body on the basis of art. 41 of the Charter that are in contrast with the international UN obligations (Cortès Martin, 2008; Lanovoy, 2016). In addition to the weight in the decision-making process, other factors must also be taken into account, such as the role played by each member in the

31Seidl-Hohenveldern references to art. 12, of the Charter of economic rights and duties of Members States that the liability regulated therein: "(…) should be determined in the light of the right given by constitution of the organization to the consent of the State concerned, when reaching such a decision (...)".

32DARIO, p. 91, par. 4.

preparation of the resolution or in the organization of the procedure for its adoption.

It is necessary to add about the material element of complicity in the adoption of an illicit regulatory act that the same can be supplemented by an illegal behaviour in itself (Lanovoy, 2016). For example, consider the conduct of Member State which is in contrast with the general obligation of good faith in participating in the voting procedures (Fitmaurice, 1952; Kolb, 2000) or to the due diligence. According to ILC would require states to guarantee the lawfulness of decisions of the body of which they are members (Lanovoy, 2016). Likewise, the obligation for Member States of the Executive Board and Board of Executive Directors to ensure that IMF and World Bank's actions respectively produce effects incompatible with the rights enunciated by the International Covenant of Economic, Social and Cultural Rights (Barros, 2015)[33].

33The obligation in question is supplemented by way of example to indicate that certain categories of rules, including those of a contractual nature, may impose themselves on States acting in the framework of international organizations. The problem that arises with specific regard to international organizations that perform functions in economic and financial matters, such as typically the IMF and the World Bank seem *prima facie* to be outside the subject of our investigation. First of all because there is no unanimity of coming, for example, in the configuration of the activity carried out by these organizations as strictly normative in the sense seen in the introduction to part II of this work. Secondly, because even to admit its normative character there is more than one doubt about the nature of the act with which, for example, the financial assistance takes place, given that some consider it a unilateral act and others as an agreement with the international State. We can consider that, at least with regard to the world bank, state support activities normally take place following the conclusion of an agreement with the Organization. In such situations, a first degree of complicity could be posed in the first approximation to that developed in this work. We refer to the possibility of examining the activity of this organization

As for the subjective element of complicity, it is believed that its assessment is in most cases easy, given that in practice the voting procedures are always preceded by statements in which the Member States express the reasons for their determinations showing full awareness of the consequences of their vote (Lanovoy, 2016).

(Follows) States' participation in UN illicit

The hypothesis of states complicity in the regulatory act of the Security Council assumes that it cannot be the object of further study in this place for which a decision of this body is likely to violate the parameters that regulate the UN activity determining thus the international responsibility (Dowhering, 1997; Oosthuizen, 1999; Reinisch, 2001; Dominicè, 2013).

The involvement of Member States with respect to a harmful act put in place by the Security Council must be evaluated according to the particular nature of this body. Art. 58 DARIO attributes a decisive role to the characteristics of the organ and type of membership in determining the complicity of States in the act of the body in question. We have also seen that art. 58, par. 2 (Liakopoulos, 2020) establishes as a general rule that the activity normally exercised by States within the framework of the organs does not in itself apply to integrate the case of

in the offense committed by States.

complicity but at the same time clarifies that in some borderline cases[34], state involvement can give rise to illicit complicity with respect to an act attributable to the organization. In these cases it can be easy to verify the actual contribution given by the individual Member State with respect to the main crime. The UN Security Council seems in our opinion to be among the borderline cases generically reported by ILC.

First of all, we specify that the composition of the Security Council based on art. 23 of the Charter presented a restricted membership with a differentiated legal position for the benefit of permanent members. This is a widely known aspect on which therefore it does not seem necessary to dwell. What is important to highlight is that the exercise of veto by art. 27 places permanent members to prevent the adoption of acts that *prima facie* are in contrast with the international UN obligations. The material element in this case would be constituted by an omissive conduct whose normative basis should be sought in the positive obligation of members to ensure that the decisions of the body do not conflict with international law. Furthermore, the negative vote of permanent members against the revocation of sanctions adopted pursuant to art. 41 of which the incompatibility with the regulatory parameters limiting the action of the Council is proven, is an accessory fact of a

34DARIO, p. 91, par. 4.

Commission type. It should be noted that even the mere threat of the use of the right of veto can take the form of illicit assistance in the same way as art. 58 on the responsibility of the organizations that it comes within the same Council. The fact is that this behaviour is in itself completely lawful because is allowed in art. 27 of the Charter. The forms of legal assistance do not to present any profile of opposition with respect to the obligations of the accomplice. Rather, the lawfulness of the behaviour in question, that is the exercise or threat of exercising the right of veto, serves as a descriptive criterion that excludes that this conduct reintegrates the case of management and control over organization's crime (D'Aspremont, 2007)[35]. If it is true that the exercise of the right of veto by a permanent member of the Security Council constitutes a lawful measure and as such does not represent a valid title of concurrent responsibility in the head of said State (D'Aspremont, 2007), it cannot be excluded that this hypothesis will constitutes illegal assistance pursuant to art. 58 (Peters, 2012)[36].

35The case of management and control that would give rise to a joint and concurrent responsibility would be supplemented by an overwhelming control exercised by some Member States on the decision-making process of the body of which they are part. The latest unspecified statement would occur only in the presence of forms of pressure not envisaged by the trust act of the entity in question.

36 It should be noted that the exercise of the power of veto can be considered an abuse of rights at least to the extent that the thesis in the exercise of the rights deriving from the membership of the bodies of the UN is considered by each Member State "legally bound to the principle of good faith, to give effect to the purposes and principles of the UN and to act in such a manner as not to involve any breach of the Charter". Dissenting opinion of judges Basdevant, Winiarski, Sir Arnol McNair and Read, Conditions of admission of a state to membership in the UN (article 4 of the

Secondly, in the cases where the decision or the absence of a decision should be in contrast with *erga omnes* obligations, Security Council Member States' conduct should, in our opinion, be assessed in the light of art. 58 and 42, par. 1 DARIO. Permanent members who are made aware of the circumstances and consequences of a legislative act on *erga omnes* obligations should work to prevent the adoption of the same act. If the violation has already occurred and continues over time, the further obligation imposed by art. 42, par. 1 DARIO by virtue of which all Member States of the Security Council and, *a fortiori,* permanent ones must prepare all lawful measures in order to put an end to "a serious breach of obligation arising under a peremptory norm of general international law". The aforementioned provision is highlighted in particular in the hypothesis that a decision in contrast is maintained as obligations of the type considered. Art. 42, par. 1 in the hypothesis under examination imposes on each of the 15 Member States the obligation already noted by the doctrine a basis for partially different assessments to bring to the attention

charter), advisory opinion, 28 May 1948, ICJ Reports, 1948, p. 57Ss, par. 21. According to Peters this circumstance occurs where the Security Council does not endeavour to face the serious violation of human rights, violating the rule that according to this perspective would be imposed by the responsibility to protect. Precisely leveraging the comment on art. 58 of the project on the responsibility of international organizations, the author states that: "The boundary line between lawful participation in the Security Council's decision making on the one hand and the assistance (or control) amounting to an unlawful act seems to be overstepped in cases of an abuse of the veto (...)".

of the Security Council the situation detected (Doehring, 1997)[37] and above all to activate within this body in order to induce him to revoke the unlawful decision by resorting more precisely to the instruments permitted by the Charter and rules of procedure. It must be assumed that otherwise state responsibility will result in the violation of the obligation of cooperation enshrined in art. 42, par. DARIO.

It seems clear that the five permanent members constitute the prototype of States with respect to those the obligation of cooperation assumes in the words of Gaja, the content of a stricter duty, as they can make a decisive contribution in the indicated perspective. It must therefore be concluded that in the hypothesis envisaged the exercise of the right of veto by the permanent members intact through the abuse of law that the doctrine links to other cases a violation of art. 42, par. DARIO.

The practice in this regard is very small. Nevertheless, we must cite a case often referred to in the doctrine that supports the thesis of complicity in the context of deliberative activities (Klein, 2010; Klein, 2012). This is the conduct held by the permanent members of the Security Council and in particular from United Kingdom, i.e. the framework of the sanctioning measures against the former Yugoslavia in the early nineties of

37Stating that the author (Doehring) links the obligation to inform the Security Council of the right of all UN Member States not to apply a resolution contrary to *jus cogens*.

the last century. We refer to the Resolution n. 713 of 25 September 1991 (Papastavridis, 2007; Seaman, 2016; Olalekan Yussuf, 2018) with which the Security Council imposed an arms embargo and resolutions n. 757 of 30 May 1992 (Van Herik, 2017; Higgins, Webb, Akande, Sloan, Sivakumaran, 2017) and n. 787 of the following 16 November with which a trade embargo was decreed (Van Herik, 2017; Higgins, Webb, Akande, Sloan, Sivakumaran, 2017).

Resolution n. 713 which forbade the transfer of arms to the Federal Republic of Yugoslavia would have substantially deprived Bosnia of its right to legitimate defense protected by art. 51, UN Charter (Higgins, Webb, Akande, Sloan, Sivakumaran, 2017). The organization of Islamic countries, in that circumstance, declared the illegitimacy of the Resolution specifying that the Member States would not have fulfilled the additional obligations deriving by the decision[38]. It should be noted that the General Assembly recommended to the Security Council: "(...) to exempt the Republic of Bosnia and Herzegovina from the embargo imposed on the Former Yugoslavia under Security Council Resolution 713"[39], sharing in such a situation the need to guarantee to Bosnia the availability

38See the following resolutions of the conference of foreign ministers: Res. 6/22-P (10-12 December 1994), par. 7; res. 7721-P (25-29 April 1993), res. 6723 P (9-12 December 1995), parr. 12-15. See also the OIC Heads of state and government declaration on Bosnia and Herzegovina, 7th Islamic summit conference, 13-15 December 1994.

39Res. 47/121 (1992).

of the military means necessary to exercise the legitimate defense even if in principle it affirmed the exclusive competence of the Security Council in order to revoke the sanctioning measures (Orakhelashvili, 2006)[40]. Regarding the legal consequences of Resolution no. 713 is worth remembering the position expressed by the judge Lauterpacht during the proceeding brought by Bosnia against Serbia concerning the alleged violations of the 1993 genocide Convention. After having noticed that a decision of the Security Council is able to put itself in contrast with the cogent right. Judge Lauterpacht believed that he could see a violation of the prohibition of genocide in the Resolution. More precisely, according to this opinion, the material impossibility for Bosnia "to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo". So that having prevented Bosnia from exercising its right to legitimate defense Resolution no. 713 would have

40Orakhelashvili affirms that the rigid distinction between primary and secondary norms meets essentially theoretical-descriptive requirements. Every rule of the international order is according to this thesis "free standing and full fledged". All the rules are created, modified or extinguished. In the same way are subject to the same implementation mechanism and above all "undergo the same process of interaction with other legal norms as manifested by the cases of defences, derogation and reciprocal non compliance". In this sense, each secondary standard is at the same time "a substantive norm, a rule of substance, an embodying the substantive rights and obligations under international law" (p. 80).

imposed on UN Member States "to become in some degree supporters of the genocidal activity of Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*" (Zimmernamm, Tams, Oellers-Fraham, 2019)[41].

Bosnia and Herzegovina announced its intention to institute contentious proceedings before the ICJ against UK on 15 November 1993:

"for violating the terms of the 1948 Convention on the prevention and punishment of the crime of genocide; of the 1965 international Covenant on the elimination of all forms of racial discrimination; and of the other sources of general international law set forth in article 38 of the international Court's Statute" (Liakopoulos, 2019).

It is important to underline that according to Bosnia the behaviour in contrast with the mentioned international obligations would have been attributable to UK:

"while acting in its capacity as a permanent member of the UN Security Council". In this context and acting in violation of the right to self-defense against Bosnia, UK would have facilitated the violation of the prohibition of genocide "by actively opposing all of the efforts by other States to lift this illegal arms embargo (...)"[42].

Among the disputed behaviours were the fact that they had concurred with their own vote in the adoption of sanctions and the threat that for the revocation of the embargo decreed by the Resolution n. 713. The proceeding feared by the Bosnian party did not take place since the 20 December 1993 the parties issued

41Application of genocide convention, provisional measures, order of 13 September 1993, in ICJ Reports, 1993, p. 325ss. And the separate opinion of judge Lauterpacht, p. 407, par. 102.

42See statement of intention of the Republic of Bosnia and Herzegovina to institute legal proceedings against the United Kingdom before the International Court of Justice, 15 November 1993, par. 1.

a joint declaration, by which the Bosnian government renounced to the jurisdictional action following an agreement that served to extinguish the controversy in question (Gray, 1994). However, assuming by hypothesis that the Bosnian claim was legally founded, a dual responsibility could be reconstructed for UK. On the one hand, this State would have contributed with its vote to the adoption of a measure that in various respects was in contrast with international obligations and conversely, could not have been adopted if the permanent members, in compliance with the rule of the two stage coaches, had prevented the adoption of the act in question. From this point of view it could be considered integrated the case of art. 58 DARIO. On the other hand, by preventing the cessation of the serious offense deriving from the sanctioning measures, the British conduct would have been in contrast with the obligation of cooperation sanctioned by art. 42, par. 1 DARIO.

Responsibility profiles and compliance with arms transfer agreements. International state responsibility for provisions violation prohibiting arms transfers

As we know, the internationalist doctrine does not exclude the Commission of illicit or international crimes through violation of the provisions governing international arms transfers.

The profiles of responsibility that will be explained below

concern both the States, or the main actors of the "trade" in arms and the individuals, i.e. those who act as public officials of the State, as well as of those acting in a completely private capacity.

Arms transfer activities are typically implemented through exchanges between States. This is admissible because of the commercial monopoly established by the States as regards both the production phase and the sale of armaments, as well as on the basis of an *opinio juris* progressively formed starting from the end of World War I.

Indeed, the need to "trade" armaments is linked to that to protect oneself or to defend oneself against possible threats of the use of armed force. Arms transfers, although dictated by legitimate self-defense purposes, nevertheless represent a threat to international security.

Moreover, the doctrine maintains that the preservation of international stability goes hand in hand, at least recently, with the respect of certain normative categories, which regulate the conduct carried out by the States in arms transfers, among which human rights, international humanitarian law and obligations arising by the UN Charter, in particular the observance of Security Council resolutions regarding restrictive measures imposed on certain States, are found (Bastid-Burdeau, 2007).

On this point, the recent Treaty on Trade in Armaments (hereinafter ATT) of 2013 was a useful starting point for most of

the doctrine for analyzing the profiles of responsibility in international law (Bastid-Burdeau, 2007).

The doctrine is substantially unanimous in affirming that articles 6 and 7 of the Treaty serve as the central pivot of the entire discipline, as they establish innovative constraints with respect to the previous and fragmented legislation. The scholar finds (in article 7) a prohibition of authorization to transfer following a positive assessment of the likelihood of committing offenses (overriding risk) (Brandes, 2013). This evaluation, to use the terms of art. 7, must be done in advance, through, for example, the keeping of registers and the consultation of the same (as required by art. 9), or by drawing up a special list listing any state or not subjects, to which is associated with the Commission of offenses and the ascertained violation of international standards.

There must be not only an evaluation of the recipient of the transfer. According to the doctrine, the obligation of observance of general international law, which also refers to UN Security Council's resolutions which establish embargoes for arms, hangs not only on the State exporter, thus violating an *erga omnes* obligation, but also on destination (Bellal, Casey-Maslen, Giacca, 2012).

First of all, there is the general problem of concrete imputability for illicit arms transfers. Where the provisions do not clarify this

profile, according to the scholar, it should always be possible to bring the responsibility back to the State, as the subject to whom is attributed the general duty of observance of international law, and especially of human rights (Bellal, Casey-Maseln, Giacca, 2012)[43]. Scholars see this approach emerge from specific obligations, such as that prescribed by art. 5 of ATT, which requires the establishment by state governments of adequate control systems which allow the prevention of illicit arms transfers. Furthermore, the responsibility of other national actors (whether public or private) involved in the transfer, at least in terms of domestic law, is not excluded.

The violation of international law can take place through a considerable number of activities. This would depend, according to the prevailing orientation, on the terminological breadth that is attributed to the term transfer, which is broader than the mere sales or supplies, considered a specification of the first category.

With regard to the protection of human rights, there are no international rules that prohibit *prima facie* illicit transfers. The main purpose of the human rights treaties is to ensure that States respect and observe the fundamental rights of the subjects, outside as well as within the sphere of jurisdiction (Bellal, Casey-Maseln, Giacca, 2012). The violation of these rules can derive from the transfer of certain weapons, subsequently used

43Artt. 1(3), 55 and 56 of the Charter of the UN.

by unauthorized subjects to possess such weapons. It is believed that this would involve at least an obligation to investigate these ends, in the light of national law, as well as of the (poor) international law.

Again with reference to the ATT, art. 6, para. 2 establishes an additional obligation for the States, placed in relation to that on the control of transfers, both in an active (for the seller State) and passive (for the acquiring State) sense.

> "(…) we consider the case of a State that does not use, by choice or by necessity, adequate resources to ensure its citizens enjoy the right to food, health, be treated humanely in detention (…) the same State would be obliged not to authorize the passive transfer (i.e. the purchase) of conventional arms, if this involves the use of resources that could otherwise be used to allow full respect of those rights, at least when the purchase is not justified from national security needs (…)" (Bellal, Casey-Maseln, Giacca, 2012).

The doctrine, therefore, believes that there would not only be human rights immediately damaged by the use of weapons in the course of an armed conflict, but also those rights connected to the economic and social life of a nation, which are identified in the performance of the essential public services, financed with state funds. A possible "distraction" of the funds for these services, motivated by exceptions to the rights (which may be that of national defense (Doswald-Beck, 2011) but not legitimized in the light of existing instruments of international law, could constitute a violation by one State and the subsequent

configuration of responsibility for the same[44].

With reference to violations of international humanitarian law, in doctrine these can be configured when the arms trade, if carried out unlawfully, can adversely affect the principle of respect and observance of the conduct to be followed during an armed conflict[45]. Furthermore, the violation may also derive from transfers that have been prohibited.

The responsibility would be further aggravated, when it was ascertained that the State and its organs have knowledge that the transfer of arms could entail a serious risk of committing international crimes. Therefore, it is underlined how this approach is well exposed in art. 6, para. 3, ATT, which, for

44This situation is found, for example, in agreements to offset debts (offset agreements), often stipulated on the occasion of a defense procurement in arms. With these agreements, two States establish a compensation compromise between the purchase sum of the arms and any previous debts of the purchaser, and in which both the main transfer services and the military supply and assistance are determined, which are perfected in the mere maintenance of weapons (carried out principally or exclusively by the selling State), the training of local armed forces and can even establish services not immediately related to the service of military supply and assistance aimed at favouring the investments of supplier companies, or take advantage of the natural resources of the purchaser's territory on an entirely exclusive basis. The compensation, therefore, would also have the purpose of endorsing any further economic interests on the part of the seller towards the buyer, which has the opposed interest in reducing its debts towards the former. This, evidently, involves a considerable "distraction" of resources on the part of the purchasing State (normally, a developing country).

45Art. 1 common to the 4 Geneva Conventions, 12 August 1949, in the Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern pp. 205-224; art. 1 (1) of the 1st Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts, 8 June 1977, Official Records of the Diplomatic Conference of the Armed Conflicts, Bern, Federal Department of Foreign Affairs, 1978. This approach has been confirmed by jurisprudence (International Court of Justice, Military Activities, para. 220) and practice (ICRC Statement on IHL criteria in Arms Trade Treaty, New York, 2010).

scholars, would have an innovative character. The types of responsibility would be configured either for the State, for helping the Commission of an offense by another State (on the model of art. 16 of the Draft Articles on Liability in 2001), or to an individual, for complicity in an international crime.

However, the doctrine also points to interpretative difficulties arising from the reference to the term "knowledge". While admitting his penalistic matrix, and even wanting to ascertain the fact that knowledge, with respect to "awareness", prefigures a lesser psychological element, the scholar does not share the choice to use this term also in reference to state responsibility.

On the contrary, to ensure that this approach exists, it would be necessary to admit that the knowledge possessed by the public official who physically transfers the load of arms is the same possessed by the State of belonging or classification. This statement lends itself to obvious criticisms: For the doctrine, the main difficulty lies in the fact that the delivery process qualifies as an administrative activity, and therefore put in place by several people, who form a "chain of transfer".

If we consider that state administrations are organized hierarchically, the hypothesis proposed would be to configure the responsibility of the "chain" in the light of the joint criminal enterprise. An analogical reference to this institute, however, could give rise to a contrast with the ban on analog application.

Therefore, not being able to resort to penal institutions by analogy, the need to decide on the question of individual responsibility incidentally in the judgment of state responsibility is revealed by the doctrine, but for the latter there would be no application of the test standard of the "beyond any reasonable doubt" typical of the criminal trial.

So what would be the correct criterion? The doctrine provides an interpretative solution, basing the characterization of the conduct conducted as attributable to the State as an apparatus. Indeed, it would be impossible to disregard the role of public official in the delivery of arms, and it would be equally impossible to disregard the classification of this subject acting within the bureaucratic-administrative structure of the State as a whole.

Therefore, it becomes easier to configure the responsibility of the State based on the reasons recognized by the doctrine, or because of the assistance of a State in the Commission of an international offense by another State, and therefore having as reference the requisites required by the art. 16 of the draft of articles on the international responsibility of States, which mentions the "awareness, on the part of the assistant state, of the circumstances of the offense" (Bellal, Casey-Maslen, Giacca, 2007).

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Although we have previously insisted on the prevalence of the author's awareness with respect to the knowledge possessed by the same, the orientation under examination confirms the impossibility of applying the concept of awareness through recourse by analogy to state responsibility. In fact, the having awareness here assumes the meaning of "being aware", with the addition of an "intent" to assist in the Commission of the offense. This last requirement can generate further problems of interpretation and procedural nature. The proof of the end

46Para. ii).

achieved through the transfer of armaments, even in view of a mere circumstance of exchange, could not coincide with the intent to commit international crimes, or international illicit actions such as aggression or unauthorized use of force. This is because, as explained above, the main purpose of the "trade" of arms for each State, to be presumed to be *ab origine,* is to avoid succumbing to a possible armed attack, therefore to defend itself. The burden of proof, according to doctrine, should be reversed in favor of the State due to a failure to foresee its fault within the discipline of responsibility.

"The very idea of "complicity" of an internationally wrongful act of another (State) necessarily presupposes an intent to collaborate in the Commission of an act of this kind and, hence, in the cases considered, knowledge of the specific purpose for which the state receiving certain supplies decides to use them. Without this condition, there can be no question of complicity"[47].

Ago, therefore, highlights the non-necessity of a specific *dolus,* when armaments are transferred to another State, but only the malice of its collaboration and the subsequent representation of the consequences that may derive from it, accompanied by the intent of trasfer (Bellal, Casey-Maslen, Giacca, 2007)[48].

The proof of this knowledge can be provided in various ways: Through an *ex post facto* presumption, or subsequent to the Commission of the offense, or with one operates ex ante, such as

47Seventh Report on State Responsibility by Mr. Roberto Ago-The internationally wrongful act of State, Source of International Responsibility, A/CN.4/307, in Yearbook of International Law Commission, 1978, vol. II, Part One, p. 58, §. 72.

48The auhors affirms that, in the light of ICJ jurisprudence on the prevention of genocide, taking the formulation of a general rule "en connaissance de cause" of the Commission, even if only potential, of some international crime can raise some doubts.

the objective knowledge of reports of verification of serious violations of law international humanitarian or human rights, or even through mere factual circumstances.

This reasoning can be done, according to part of the doctrine, also with reference to the Commission of the crime of genocide and to the relationship with the complicity in the same. Taking into consideration ICJ jurisprudence (Bellal, Casey-Maslen, Giacca, 2007), scholars argue that complicity in crime must result from a Commission or positive action, both for States and for other actors other than the State (Bellal, Casey-Maslen, Giacca, 2007). The doctrine also claims that the general obligation to prevent the Commission for the crime rests on the State. Therefore, it can be highlighted when the transfer is to be considered a material contribution (Bellal, Casey-Maslen, Giacca, 2007).

International criminal liability for crimes committed following arm transfers

However, as far as the individual responsibility is concerned, it should be pointed out that this is outlined when there are penal or administrative rules which punish the illicit transfer of armaments. Part of the doctrine believes that in international law there is still no provision for criminalizing these behaviours although it may be considered an illegal act, arms trafficking

lacks of its own configuration as an international crime, and the choices of States to criminalize such conduct are well founded on the mere impulse of domestic politics.

In this regard, another part of the doctrine argues that such a gap would depend on the mere "exhortative" character of international norms, where the same "impose" on States an obligation to do, that is, to foresee, through domestic law, these behaviours as unlawful[49]. But this type of obligation, which also translates into an obligation of result for the States, is immediately considered applicable to individuals, since doctrine qualifies it as an obligation having a customary nature (Ragni, 2013)[50]. Indeed,

> "the criminal liability of individuals in relation to conduct contrary to the rules on arms transfers could be ascertained directly under international law. In particular, we refer to the possibility of sanctioning the activity of individuals (...) involved in arms transfers, in the event that the arms transferred are used to commit international crimes (...)"[51].

Therefore, what can be relevant in domestic law is the possibility that individuals, held responsible for trafficking in arms with other States, are judged on the basis of the institution of complicity in the Commission of crimes (aiding and

49Article 5 (b) of the 2001 Protocol cited above; art. 10, on the activity of brokering, and 11, on the distraction of transfers, of the treaty on the arms convention.

50On the possibility of applying a general international standard to individuals, see the Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, in the case of Ayyash et al., Special Tribunal for Lebanon, Chamber of Appeal, 16 February 2011, STL-11-01 / I, para. 145 et seq. In particular, in the decision cited above, we note how the notion of terrorism applicable before the STL, and consequently its configuration as an international crime, derives above all from the customary nature of the phenomenon.

51The Guus Kouwenhoven case, as with other internal judicial events, will not be taken into account during the preparation of this work.

abetting), as such subjects:

"Provides (to) another person (s) useful for committing the crime, therefore he becomes liable in criminal matters in that with his conduct he helps (no) or knowingly favors the material author of an international crime, although not necessarily sharing its intentions (...)" (Laviolette, 1998; Nebesar, 1998; Henry, 2002; Williamson, 2008; Bettwy, 2011; Beigbeder, 2011; Kirby, 2012; Kelly, 2013; Behrens, Hennam, 2013; Mouthaan, 2013; Piccolo, 2013; Lingass, 2016)[52].

As for the requirement of knowledge, which allows to impute state responsibility, so also for the imputability of complicity in international crimes, according to this orientation, a degree of knowledge would be required, understood as: "(...) The mere awareness of the subject who provides the assistance of the criminal purposes of the principal responsible and who with his actions assist him in the Commission of the crime (…)" (Liakopoulos, 2019).

According to this point of view, it would not only be necessary to achieve the object of incorporating information that allows

52The juridical formula is taken into consideration by a large part of international jurisprudence, including the judgment of 18 May 2012 of the Special Chamber for Sierra Leone in the Prosecutor v. Charles Taylor case, SCSL-03-01-T. Former president of Liberia, Charles Taylor was convicted of inciting and supporting the Commission of international crimes in Sierra Leone, through the supply of arms to the Rebel United Front (RUF) rebels. This appears to be the only ruling of an international court that directly takes into consideration the issue of aiding and abetting through the supply of armaments at the international level. The situation with regard to the Akayesu sentence issued by the Tribunal for Rwanda is different (ICTR-96-4, sentence of 2 September 1998, para. 533-37). In this case, there was the supply of armaments for the Commission of an international crime (specifically, genocide), but the transfer took place within the national territory. Furthermore, the Furundžija (ICTY, IT-9517/ 1.T, sentence of December 10, 1998, para. 249) sentence takes into account a different territory than the *locus commissi delicti*, or rather the one of carrying out the armed conflict, as the supply in itself it had occurred outside the space of the supplier or broker, but the final result of the transfer was however the facilitation in the Commission of international crimes.

the subject to set a mental framework, in which the Commission of international crimes is highly prefigurable. Individual criminal liability would further require that this information be processed by the aider, who, in turn, will have to come to an awareness of the probable Commission of the crime. This logical process is considered the minimum requirement for attributing assistance in the Commission[53].

Even the reconstruction of psychological element lends itself to further criticism. The doctrine illustrates how in some cases the substantial effect was put forward (Martins Amorium Dutra, 2012; DeGuzman, 2013; Shany, 2013; Botte-Kerrison, 2017)[54], which takes the form of a contribution that is essential for the Commission of the crime, facilitating or accentuating its effects (Leandro, 2013)[55]. In others, on the other hand, the requirement of intent was emphasized, establishing that it should be specifically oriented (specific direction) to commit international crimes, when there was geographical, material or other proximity between the activities of the supplier and those of Commission of crimes (Subotić, 2014; Ostojic, 2014; Gow, Kerr, Pajic, 2014; Orentlicher, 2018)[56].

53See, for example, the Furundžija cases, para. 249; Prosecutor v. Blaškić, IT-95-14, 1.T, sentence of 3 March 2000, para. 286; Taylor, §§ 6904, 6947-6952.

54ICTY, Prosecutor v. Anto Furundžija, Judgment, TC, IT- 95-17/1-T, 10 December 1998, par. 162.

55Leandro considers that this criterion reflects customary law, with particular reference to arms transfers.

56ICTY, Prosecutor v. Perišić, IT-04-81, judgment of the Chamber of Appeal of February 28, 2013, § 36. This last configuration of the requirement contrasts well with

Criminalization of illicit brokering and deviation of the arms load (diversion)

As seen above, arms transfers would take place, internationally, even by individuals, who would act as intermediaries between supplier and receiving party. This brokerage, in the common opinion, if not authorized by the selling State or the buyer, or even if totally prohibited by international standards, is considered illegal. The issue of illicit brokering more directly affects the ATT, where it establishes that States must adapt their internal regulations in order to adequately sanction those who provide an unauthorized intermediation service.

In doctrine, it is believed that this type of activity, connected with the main ones of transfer, is sustained in the provision of a service by individuals or juridical persons, such as companies of war production (Keppler, 2001; Wood, 2009). On this point, the 2007 Report of the UN Panel of Experts on Illicit Brokerage[57], took place, explaining what functions should be performed through the brokering service, namely:-Seeking business opportunities between several parties; -put two or more parts in contact; -provide any kind of assistance possible to facilitate the

the psychological element of the crime, understood as a single knowledge (Thus also in art. 25 (3) of the Statute of the International Criminal Court of 17 July 1998, in UN Treaty Series, vol. 2187, pp. 3). Unlike this perspective, the normative formula used by art. 6, § 3, of the Arm Convention Treaty, which can be used to define the *mens rea* of the physical subject acting in the transfer of arms, and configure its responsibility.

57Report of the Group of Governmental Expert on Illicit Brokering in Arms Transfers, 30 August 2007, A/62/16, § 9.

conclusion of the agreement, or assist the parties in the bargaining, preparation of meeting places, means to facilitate exchanges and related services; -assist the parties in the steps related to the preparation of the fundamental documentation (including end-user certificates, including falsified ones) and in the execution of the payment; -Finally, prepare a service for the supply or sale of weapons to third parties.

Another form of brokering can be identified, according to the panel's explanation, among those after-sales assistance activities, such as the preparation of a training service for the use of weapons, supply of spare parts, or even advice on the possibility of putting in practice, an offset agreement, in order to reduce costs or amortize them in subsequent periods[58].

The Report also takes into account the nationality of the broker and the illicit nature of the activity performed. With reference to the first point, the broker can be of the nationality of one of the contracting parties, or it can be a third party, and the activity that it provides can be provided in one of these three States, while is not certain that the transfer of arms it takes place in the State of nationality or in the contracting one, as also is not clear if the broker assumes, albeit for a limited period of time, the title of ownership of the arms transferred[59]. The character of illegality,

58Report of the Group of Governmental Expert on Illicit Brokering in Arms Transfers, op. cit., par. 10.

59Report of the Group of Governmental Expert on Illicit Brokering in Arms Transfers, op. cit., par. 11.

on the other hand, according to the Panel, derives from that of qualification that a State gives of such activity through its own regulations, both as regards the activities as a whole and taken individually[60].

This broad consideration of what the activities are, and the various events they can take on, is identified, on one side of the doctrine, as a systematic approach to the world of arms supply, where the supply and transfer chain could take unknowable paths, or outside the regulatory framework that has been established, thus facilitating the spread of illicit practices in the sale of weapons

The indication of the Panel on what are the relevant activities for the brokering would not seem to have been fully regulated, according to a large part of the doctrine, within the ATT. In fact, art. 10 states that States must adapt their internal regulations, based on the obligations of universal or regional international law, in order to adequately regulate and take various types of measures (both criminal and administrative) to counter the phenomenon of illegitimacy brokering. This seemed to be a step backwards from what had been established in a soft law instrument, such as the Program of Action against the proliferation of SALW.

Otherwise, a minority of the doctrine believes that, despite the

60Report of the Group of Governmental Expert on Illicit Brokering in Arms Transfers, op. cit., par. 13.

lack of a prohibition expressed in the Treaty, the common opinion has spread that regulate and control the intermediation activity, allowing it only by subjects or bodies that have adequate authorizations, it would have the purpose to prevent that the weapons end up to people different from those indicated in the certificates of final user, and that the use for purposes different from those indicated is prevented.

Transfer activities may also be subject to a deviation from the set route, which may be classified as lawful or illegal, depending on the provisions contained in national or international regulations. This could happen in cases where there are no effective controls, which can be applied to end-user certificates, and which can also be ignored, or even not released, and thus facilitate arms trafficking. The problem of deviation (or diversion) is therefore relative to the inadequacy of controls.

The prevailing orientation highlights two types of diversion: The unauthorized deviation of arms loads (specifically SALW) that are sold lawfully, due to the lack of effective controls at the exit or entry of States, and that they are even less effective during the journey made by the weapons, or the deviation that would occur due to the lack of adequate controls by the companies or those that deal with the production and sale of arms on behalf of States.

For scholars, diversion can take place at any stage of the

transfer, including the phase following the arrival at the destination of the load and the screening of the regular documentation possessed for transport. It can also take the form of a report of disappearance or theft of the load, tending to associate this act with criminal complicity of the company. More often it can take the form of a diversion accomplished through the re-exportation of the cargo, which can be performed in cases where no specific clause has been provided in the exchange agreement, or when there is no provision of domestic law that prohibits it, or finally when the coordination between the various national authorities in charge of controls acts ineffectively, making these controls *tamquam non essent.*

Government and public law subjects may also be involved in the diversion of the load. In particular, according to statistical reconstructions, reported by the doctrine, is above all the military and state defense branches that commit such an offense, given the availability to them of both the load of armaments, and the certificates of use of the same, and finally due to the possible configuration of corruption phenomena to which they can adhere.

A significant example of the importance of diversion in international law is found in relation to the deviations of planes (and therefore of the related cargo).

Aircraft hijacking is described by the Institute of International

Law as “acts of seizure or an exercise of control of aircraft in flight”. If such types of conduct were to be carried out, the doctrine considers it necessary that the States, in whose jurisdiction the perpetrator of the crime is located[61], take action to pursue the same, without prejudice to the possibility of proceeding with the extradition. To this is added the specific obligation of States to assist with any means possible the aircraft diverted into the territory of the same, subject to the consent of the owner and the flag State, as well as the due diligence obligations regarding the preparation of effective controls to land.

By applying these considerations to the loads of armaments (McWhinney, 1975), is possible to find the typical conduct that authoritative doctrine defines as “skyhijacking”, from which the definitions of “hijacking” derive for profit and “sky bandits” (McWhinney, 1975).

According to scholars, this would take place because of the end manifested during this type of activity, or the hijacking of the aircraft, as well as the seizure of the load of weapons, presumably takes place in order to take possession of a “sensitive” commodity, to profit from it directly (through its sale) or indirectly (by perpetrating various types of criminal offenses) (McWhinney, 1975).

61Convention on International Civil Aviation, firmed in Chicago on 7 December 1944, art. 1 et seq.

Even with reference to the case of diversion, the doctrine strongly criticizes the choice made by art. 9, ATT would have granted ample discretion to States both in deciding which activities should be considered as deviation of the load of arms, and in providing the most suitable means to foresee the illegality of such conduct, with the risk of nullifying the objective set by the treaty.

Tools for compliance with the required obligations

A last, but fundamental, reference must be made to the control mechanisms present in the context of international discipline of arms control, in particular drawing on general ideas from the observations on existing compliance mechanisms.

This paragraph will aim to illustrate first of all the meaning of constraint set by most of the arms control agreements, and in particular we analyze the legal influence of political value of these agreements. Later, any observance resulting from the provisional application of the agreements will be considered. Finally, the analysis will focus on the exposition of the main control and fulfilment mechanisms of the treaties.

Political significance of arms control agreements

To "agreements" establishing a control on the proliferation of weapons is recognized the value of international agreement

(Ahlström, 1999; Den Dekker, 2001). Their ability to bind the signatory States, however, does not depend on the nature or value, but on the value that is attributed to this type of agreement. Most of the doctrine underlines, in this regard, how there is a general political will to stipulate, but also is recognized the discipline of arms control based on principles of international law, such as the prohibition of armed aggression and respect for international peace[62], as set out in the UN Charter (Den Dekker, 2001).

In light of these rules, the doctrine emphasizes the willingness of States to enter into such agreements in order to drastically or greatly reduce their armaments, or limit their acquisitions, and thus protect international peace and security. The manner in which these agreements are stipulated is identified in political negotiations that lead to the conclusion of agreements (Den Dekker, 2001). Moreover, the doctrine would support the belief perceived by the States of a discipline of arms control as functional and instrumental to the pursuit of certain international political aims, or "to achieve the objective of improved security and, through that, to reduce the chance of war (…)" (Den Dekker, 2001).

Furthermore, part of the doctrine has subsequently been

62Art. 2 (4) of the Charter, to which is added the principle of equalization of States in the international community and the prohibition of interference in internal affairs, enucleated in art. 2 (1).

questioned about the opportunity that States have to stipulate non-binding agreements on armaments. In this sense, we highlight three characteristics, which are found in most agreements of this type.

The first would be found in the flexibility of these types of agreements, by virtue of the changing nature of certain situations that must be regulated and the need to have an instrument adaptable to the situation that arises. Moreover, the need to have a flexible agreement would also be identified in the possibility of renegotiating the terms of the agreement at a later time, thus avoiding the rigidity typical of most binding agreements of international law (Ahlström, 1999).

The second characteristic would be identified in the rapidity of stipulating these types of agreements, or a State would be more inclined to conclude them where is not necessary to follow any solemn procedure (Ahlström, 1999). This, however, is also considered in the light of domestic law, which differs from State to State in the regulation of transposition and adaptation methods to these types of agreements (Bjorge, 2014, Hollis, 2020; Fitzmaurice, Merkouris, 2020)[63].

The third, finally, would be identified in the confidentiality that is generated by agreements of this type, or the need not to make the results of transparent, at least internally, negotiations in order

63In this sense see: art. 26 VCLT.

to avoid the intervention of the legislative power, which could, in some cases, deciding to authorize parliamentary ratification of the agreement just signed (Ahlström, 1999).

Political significance can also be deduced from the classification of arms control agreements. In particular, part of the doctrine holds that a greater distinction should be made between treaties for which there has been a voluntary entry or accession by States and those having a "coercive" nature, such as ceasefire agreements or peace treaties. With specific reference to the first category, the types of agreement are identified according to general models, that is distinguishing between bilateral treaties[64], multilateral agreements and accessory documents or annexes to treaties. As regards conventional arms, the treaties open to regional distribution are important, which, according to the common opinion, would have a typical structure of multilateral treaties for arms control. A short text of a treaty nature, a series of attachments and related documents, in addition to the possibility of issuing derivative documents, for example where an institutional set-up has been provided[65].

Most of these agreements, however, would produce, according to the doctrine, a series of documents with merely programmatic value, which can easily address the future behaviour of States.

64In which we understand above all the agreements for the limitation of nuclear proliferation, such as the SALT I and II agreements and the START Agreement.

65As the periodic meeting of a conference of the States Parties, or as informal meetings for regulatory needs (eg, the Wassenaar Agreement).

The political nature of these agreements, therefore, would favor the accession of States to programs set up for arms control.

But in addition to a more direct function control, these instruments have a fundamental role in directing future negotiations of agreements for control, as well as establishing a basic procedure for negotiation (Den Dekker, 2001). Furthermore, there are also those who maintain that these agreements would enjoy more the application of the principle of good faith, due to the future expectations of international community for the observance of the discipline of this sensitive subject (Ahlström, 1999).

Provisional application of arms control agreements

An argument of little debated in the doctrine, but that has a fundamental function, can be found in the provisional application, established with specific clauses, of agreements that regulate aspects relating to the control of weapons.

This need would seem to have arisen, as doctrine emphasizes, in the 1990s, when most of the disarmament agreements were stipulated. The need that has been found at the base of this progressive discipline, and consequent provisional application, is the urgency of application and fulfilment of such agreements, where is believed that the discipline in question must find an immediate application before the attainment of the number of

ratifications needed (Michie, 2005).

The possibility of having recourse to these clauses is found in the connection that one has between the necessary urgent application and the weightings that must be had internally, or rather one must take into account above all the requirements of domestic law, the adjustment in progress, the costs that must be addressed, as well as the ratification authorization processes that must be completed in order for the agreement to be applied in the ratifying States (Michie, 2005). “Political” considerations are also extended to the possibility of including certain states that have a particular technological and military advancement in the field governed by the single treaty. This, therefore, would be read, by the States and by doctrine, as a conditional requirement, to which the ratification of the treaty will be subject (Michie, 2005).

The provisional application would, in fact, also have legal implications of no small importance. In fact, given the political significance of many agreements, as seen above, the parties will take into consideration the fact that every type of act, carried out by a single contractor and that is in contrast with the object and purpose of the agreement, can produce negative future consequences for other parts. For this reason, in the interim period between the opening to the signing and the entry into force of the agreement, the provisional application would also

have the function of avoiding any conflicting attitude, by virtue of the application of the principle of good faith in international agreements (Michie, 2005)[66]. And this principle would also be addressed by the minority doctrine as a more stringent obligation in the field of disarmament and arms control, given the sensitivity of subjects dealt with and the close connection with the preservation of international peace and security[67].

Compliance with agreements and mechanisms

Since most of the arms control agreements are characterized by a lack of constraint, are there possibilities to enforce the obligations set by these agreements or understood in full?

A large part of internationalist doctrine tried to answer this question, when it approached with a critical evaluation of these treaties. A prevalent orientation has tended to affirm that these agreements have established a sort of "international cooperation law", where it was necessary to regulate, through multilateral channels, common problems of the international community, and in particular the threat of a nuclear explosion or the proliferation of conflicts worldwide (Ulfstein, Marahaun,

66Art. 18 VCLT.

67International Law Association, Final Report of the Committee-International And National Legal Regulation for Arms Control and Disarmament, Berlin, 2004, para. 5. This would seem true at least in the case of nuclear weapons and mass destruction in general. Such an obligation would not be present or verifiable in the context of conventional arms, where the Report itself (§ 11 et seq.) mentions only the exhortative character of the instruments of international law and the role of implementation and consultancy that NGOs carry out in this field.

Zimmermann, 2007). In this regard, this orientation underlines how the compliance of a State with the obligations provided by the treaty to which it is a part is not only an abstract aspect and of, so to speak, “moral” nature in international law, but is even in the interest of parts of the treaty. Therefore, it would be the basis of the establishment of compliance mechanisms, or fulfilment, of the treaties concerning arms control (Ahlström, 1999).

On the other hand, it has been argued that ensuring compliance and adaptation to this type of agreement would not be possible, given the overriding political nature of the constraint assumed and the possibility for states not to feel bound by such provisions (Williamson, 2003; Haramoto, Sakai, Shibata, 2015; Sandholtz, Whytock, 2017; Bowman, Kritisiotis, 2018).

More specifically with regard to individual mechanisms, the prevailing doctrine identifies three main instruments for compliance, namely the procedures for the peaceful resolution of disputes, the infringement and for the implementation procedures, fulfilment and verification of the obligations of the treaty (Marahaun, 2007).

With regard to the first instrument, its diffusion was considered central at the beginning of the 20th century, when the Hague Conferences established the principle of peaceful resolution of international disputes to replace the use of force in international

relations (Merrils, 2011). Generally, few recent examples of clauses for the resolution of disputes concerning the interpretation or application of an arms control treaty are known, and the doctrine tends to evaluate this lack of provision as a repulsion for a "repressive" instrument of states' behaviour, who continue to feel unconstrained in treaties of this type. Recently, however, a minority orientation of the doctrine would have supported the need to resolve disputes on the matter through the institution of arbitration.

Preferable, according to the doctrine, would seem the instruments of the second type, or fulfilment clauses, between which the procedures for the application and observance of the treaty are found. For the first type, the prevailing doctrine holds that such predictions cannot be lacking in arms control treaties, since they would have the function of preventing the dispute from degenerating into harmful effects for the application of the treaty, even compromising future compliance with the agreement (Den Dekker, 2001; Marahaun, Harahaun, Zimmermann, 2007)[68].

68From a historical point of view, however, the first tendency towards disarmament was to attribute a specific power to the Security Council, due to the sensitivity of the matter treated and the possible assimilation as a threat to national peace and security. This tendency would seem to have been arrested on the basis both of the impossibility of adopting sanctioning measures, given the Council's blockade during the Cold War, and on the basis of a clear desire by the States to create specific and self-managed control systems. On the self-sufficiency of international regulatory regimes, see the Report of the Study Group of the International Law Commission on the fragmentation of international law, A/CN.4/L.682, of 13 April 2006.

These would also appear to be accompanied by tools of the third type, namely the procedures for verification, inspections and controls, typically found in treaties for the control of weapons of mass destruction[69], whose function would be to make transparent situations considered illegal, and therefore would have the possibility to highlight, through the reconstruction and analysis of facts, the unlawfulness of which one complains.

As regards the distinction between this type of mechanism (very similar to inquiry or consultation) and the judicial resolution of disputes, the doctrine is not uniform in laying down a precise distinctive sign between the two. This is mainly due to what should be considered a controversy in the area of arms control. In this sense, the doctrine would not be uniform in considering what mechanism is necessary to apply to a given situation. A first orientation maintains that the resolution of disputes is experienced when an interpretation relating to the fulfilment of the obligations of a treaty cannot be achieved through the sole experiment of a verification, which, as just illustrated, would be limited to an assessment of the disputed facts, and not even to provide a decisive interpretation (Trimble, 1989; Den Dekker, 2001)[70].

69An example can be found in the art. 9 of the Convention on the prohibition of the development, production, storage and use of chemical weapons and on their destruction, signed in Paris on 13 January 1993, in UN Treaty Series, 1997. vol. 1975, n. 33757, pp. 470ss.

70Trimble clearly explains the difference between the instrument of the investigation and the other means of resolving disputes, arguing that the former would

According to a minority orientation[71], in the arms control treaties it would also be possible to carry out countermeasures, which do not have the nature of retaliation, such as also withdrawing, denouncing or ending the treaty, where "extraordinary events"[72] occur that prevent the continuation of the contractual relationship and therefore determine the termination of the execution of the treaty. Where the treaty is multilateral, the doctrine still supports the possibility of suspending the agreement for a serious violation of the treaty, based on art. 60 (2) (c) of the Vienna Convention, which would be applied beyond its express formulation, as it was considered a general rule (Marahaun, 2007).

Finally, it is generally considered that the sanctions of the UN

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have a mere ascertainment function, becoming very often instrumental to the latter where there is uncertainty about a mere fact to be ascertained for the purpose of a negotiation, or when it is necessary to resolve a dispute judicially.

71Agreements of this type are considered by the doctrine as self-sufficient regimes, where institutional systems for control are envisaged, and consequently provisions are provided for the resolution of any disputes (for example, the cited Chemical Weapons Convention, or the Convention on non-compliance, proliferation of nuclear weapons in 1978, which established the International Atomic Energy Agency, a body responsible for verifying the fulfilment of the States that develop nuclear energy programs). It is not infrequent, however, that, following the non-fulfilment of the provisions, the States decide the application of economic countermeasures, or even resort to the collective security system provided for by the UN Charter. Given the potential threat to international peace and security that these types of weapons hold, the Security Council would be entitled to intervene. This is the case of Iran, subjected to penalties for failure to comply with the IAEA obligations between 2002 and 2015. As regards the area of conventional arms, such measures would not be envisaged, therefore having to support the sole possibility of resolution peaceful settlement of disputes between States Parties.

72This expression is reported in art. IV of the Limited Test Ban of 1963, and is placed in relation to the supreme interests of the State that intends to withdraw, denounce or terminate the treaty.

Security Council are admissible, where the compliance mechanisms are not effective and there are no further remedies for violations. The Council, therefore, will have a power of intervention, when the situation generated may be likely to threaten international peace, pursuant to art. 39 of the UN Charter (Henriksen, 2019). This power, in fact, would seem to be considered residual, since the States themselves regulate the matter and expressly provide for compliance mechanisms (Marahaun, 2007).

Concluding remarks

The complicity of States in acts carried out by international organizations within the framework of the regulatory activities is based on the assumption that a third-degree source of the order is likely to integrate an illicit fact. In our opinion, this hypothesis can be seen in the decisions taken by the functional bodies that are not only binding on their recipients but also have the characteristic of imposing specific conduct obligations without leaving any margin of discretion with regard to their execution. Determining whether or not an obligation to conduct has been violated appears to be rather simple. A violation will occur whenever the conduct known to you is active or omitted will not comply with the one imposed by the law to nothing, detecting the effects of misconduct.

We have seen how the examination of these profiles is conditioned by the difficulty of separating the conduct of the organ from that of individual States that compose it. In this regard, ICJ's jurisprudence seems to dispel any doubt, pointing out that the conduct of individual members is susceptible of a separate legal assessment with respect to that relating to the normative act that they combine to determine. In particular, the responsibility of these States for the vote expressed within a given body can be based on at least two different legal titles. In fact it can be determined by the violation of a primary obligation that binds the individual member, as shown by the FYROM v. Greece case of 2001. The second legal title is relevant in our investigation, namely the hypothesis in which the vote expressed by the Member State integrates an accessory fact based on art. 58 DARIO. We have tried to highlight how this specific case of complicity is conditioned on the one hand by the reported need to distinguish the will and activity of the State from that of the body of which the latter is a part and on the other by the need to guarantee the ordinary functioning of the organization as an independent subject by Member States.

The solution formulated by ILC in art. 58 DARIO. In our opinion, the equilibrium point between the aforementioned autonomy of the functional entities and the need for the regulation to sanction the social disvalue represented by the

conduct of Member States of these bodies is configured. The norm on complicity is therefore declined here in partially different terms from those reconstructed in chapter II of this work. The fundamental difference lies in the causal link between the accessory fact, constituted by members vote and the main fact constituted by the act approved by the organization and attributable to it. This requirement appears to be in terms of conditionality in the sense that is considered satisfied if the main act would not have taken place without the intervention of the accessory conduct. In assessing the factual circumstances, the actual contribution of the Member State is relevant, which can also be measured in light of the weight assigned to it by the internal law of the principal responsible organization.

As a paradigm of this hypothesis, the role played within the UN Security Council by the permanent members who, based on UN rules, are able to influence the adoption or not the decisions of the board on the basis of Chapter VII of the UN Charter (Hamonic, 2018; Marc De La Sablière, 2018; Higgins, Webb, Akande, Sivakumaran, Sloan, 2018).

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